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Truth and understanding are not wares like peanuts or potatoes.[1]

I
Introduction

Since 1940, the Federal Communications Commission (FCC) has regulated the market structure of the broadcasting industry through an assortment of ownership rules. For example, "cross-ownership" rules prohibit a broadcast licensee from also owning a newspaper or cable television system in the same local market,[2] while "multiple-ownership" rules prohibit any one firm from owning more than one broadcast license in a local market.[3] In addition, the FCC imposes a ceiling on the total number of television and radio stations a single firm can own nationally.[4]

The ownership rules advance the FCC's policy of "diversifica-

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1. Associated Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (affirming injunction against enforcement of news agency's by-laws that restricted membership and forbade members from furnishing news to non-members).

2. 47 C.F.R. § 73.3555(c) (1984) (prohibiting ownership of a "cognizable interest" in newspaper and broadcast licenses in the same local market); 47 C.F.R. § 76.501 (1984) (prohibiting ownership of cable television system by any national network, or by any local television licensee). A "cognizable interest" is any partnership or direct ownership, or any voting stock interest equal to 5% or more of the outstanding voting stock. 47 C.F.R. § 73.3555, Note 2.

3. 47 C.F.R. § 73.3555(a) (1984) (prohibiting ownership of cognizable interests in more than one broadcast license in the same service and in the same market); 47 C.F.R. § 73.3555(b) (1984) (prohibiting ownership of cognizable interests in TV and AM or TV and FM licenses in the same local market).

4. The Code of Federal Regulations provides that:

> (1) No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or

tion."[5] By placing the channels of communication under the control of as many different speakers as possible, the FCC intends to promote affirmatively what the first amendment[6] protects passively: the free dissemination of diverse ideas.[7] As a secondary goal, diversification is also intended to prevent undue economic concentration.[8]

In recent years the FCC has aggressively deregulated the broadcasting industry.[9] Citing the remarkable transformations in the video marketplace wrought by new technologies such as cable television,[10] video cassette recorders (VCRs),[11] subscrip-

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directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) more than fourteen (14) stations in the same service, or

(ii) more than twelve (12) stations in the same service which are not minority-controlled.

(2) No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or

(ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

47 C.F.R. § 73.3555(d) (as amended Feb. 1, 1985).

5. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780-81 (1978) (affirming the Commission's prohibition on local newspaper/television combinations).

6. The first amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

7. *FCC v. NCCB*, 436 U.S. at 780-81. For a Commission statement of the policy, see Matter of Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, para. 99 (1975) [hereinafter cited as Newspaper/TV Order].

8. "Sometimes, this [antitrust] policy will yield, however, to the even higher goals of diversity and the delivery of quality broadcasting service to the American people." Newspaper/TV Order, *supra* note 7, at para. 99.

9. *See, e.g.*, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 49 Fed. Reg. 33,588 (1984) [hereinafter cited as Deregulation of Television]; In the Matter of Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981) [hereinafter cited as Deregulation of Radio]. For a deregulation manifesto penned by current Commission Chairman Mark S. Fowler and his Legal Assistant, Daniel L. Brenner, see Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

10. Cable television operates by receiving broadcast signals via satellite, microwave, or telephone transmission, and retransmitting these signals to customers over coaxial cable. Cable television can provide as many as 108 channels to viewers.

tion television (STV),[12] multi-point distribution services (MDS),[13] low-power television (LPTV),[14] and direct broadcast satellite systems (DBS),[15] the FCC has conducted rulemaking proceedings to remove content[16] and ownership[17] regulations from existing services and to deregulate *ab initio* new services as they enter the market.[18]

Two recent FCC rulemaking proceedings serve as striking examples of the Commission's deregulatory fervor. In 1980, the FCC issued a *Notice of Inquiry*[19] into proposed rules for the new direct broadcast satellite service. After receiving comments from interested parties, the FCC, as it originally intended, decided not to impose multiple-channel or cross-media

11. Video cassete recorders allow viewers to tape broadcast or cable signals on magnetic tape. This allows "time shifting" of television shows as well as the rental or purchase of movies, educational programs, and various other shows on cassette tapes. See Sony Corp. v. Universal Studios, 464 U.S. 501 (1984) for a discussion of the copyright infringement aspects of VCRs.

12. STV is a technology whereby signals are scrambled before they are broadcast. Customers then "subscribe" to the use of a "box" to unscramble the signal that is received.

13. MDS is simply broadcasting signals at microwave frequency. Unlike cable television, MDS does not require extensive facilities and may compete well with cable in urban areas.

14. LPTV is television broadcast at lower power than is normally used in order to reach a very limited area. This allows the proliferation of many stations broadcasting on the same frequency.

15. DBS signals can be received only through the use of satellite dishes. The expanding network of communications satellites can result in the potential receipt of hundreds of different stations.

16. *See* Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317 (1984). The fairness doctrine requires broadcasters to present full and balanced coverage of issues of public controversy. *See* Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Congress ratified the fairness doctrine in an amendment to § 315 of Title 47 of the United States Codes. The FCC ultimately decided that, although it felt the doctrine had outlived its usefulness, only Congress could repeal it. General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35,418 (1985).

17. *See, e.g.*, Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules, Report and Order, 49 Fed. Reg. 19,670 (1984), *appeal pending sub. nom.* National Ass'n for Better Broadcasting v. FCC, No. 84-1274 (D.C. Cir.) (filed June 29, 1984).

18. *See, e.g.*, Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Report and Order, 90 F.C.C.2d 676 (1982), *aff'd in part and rev'd in part*, National Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) [hereinafter cited as DBS Order].

19. Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Notice of Inquiry, 45 Fed. Reg. 72,719 (1980).

ownership restrictions on DBS licensees.[20] More dramatically, on August 6, 1984, the Commission adopted a *Final Rule* that would have raised the limit on the total number of AM, FM, and TV stations any individual could own from seven (the "Seven Station Rule") in each medium to twelve (the "Twelve Station Rule").[21] Moreover, the Final Rule included a "sunset" provision removing all ceilings on ownership by 1990.[22] On reconsideration—and under intense pressure from Congress—the FCC added a cap on the total audience that each owner could reach (the "audience-reach cap") to the twelve-station limit and repealed the sunset provision.[23]

In both its decision to amend the Seven Station Rule and its decision to leave DBS unregulated, the FCC declared emphatically that the video marketplace is competitive enough to check any undue accumulations of broadcasting power.[24] If competition should fail to advance the FCC's diversification policy, the Commission stated, the antitrust laws can effectively correct market imperfections.[25] It said that new and changing technologies need to be tested and given the opportunity to mature in an unregulated marketplace before the Commission can decide how best to protect the public interest.[26] The FCC also promised to continue to monitor transactions that might unacceptably reduce media diversification.[27] Thus, the FCC proposed to retreat to a defensive position with respect to its mandate under the Communications Act of 1934 ("the Communications Act")[28] to promote the "public convenience, interest, or necessity."[29] The fate of the public's interest in diverse and antago-

20. DBS Order, *supra* note 18, at paras. 91-98.

21. Amendment of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 49 Fed. Reg. 31,877, para. 5 (adopted July 26, 1984) [hereinafter cited as Twelve Station Order].

22. *Id.*

23. Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 50 Fed. Reg. 4666 (released Feb. 1, 1985) [hereinafter cited as Twelve Station Order Reconsidered].

24. Twelve Station Order, *supra* note 21, at para. 74; DBS Order, *supra* note 18, at para. 95.

25. Twelve Station Order, *supra* note 21, at para. 78; DBS Order, *supra* note 18, at para. 95.

26. Twelve Station Order, *supra* note 21, at paras. 109-11; DBS Order, *supra* note 18, at para. 81.

27. Twelve Station Order, *supra* note 21, at para. 108; DBS Order, *supra* note 18, at para. 98.

28. 47 U.S.C.A. §§ 151-611 (West 1962 & Supp. 1985).

29. Section 303 of the Communications Act provides:

nistic sources of news and ideas would be left to the economics of the broadcast/video marketplace.

This note first examines the sources of the diversification policy in first amendment jurisprudence and in the broadcast industry. It concludes that precedent and reason demand that diversification remain a policy of actively promoting an industry structure in which more speakers have access to more listeners, and vice versa. This note also argues that the antitrust laws, as currently enforced, are blind to non-economic concerns, and thus are an inappropriate and inadequate guardian of the public's first amendment rights and interests. In particular, the antitrust laws' predominant concern with economic efficiency permits, and has permitted, one or a few large firms to dominate industries, including the television broadcast industry. Ownership concentration in broadcasting, even if a result of economic efficiency, is antithetical both to the FCC's longstanding diversification policy and to the public's right to free and informed speech.

This note concludes that the increasingly rapid pace of technological change indicates a need for more precise and innovative policies designed to promote and protect the first amendment rights and interests of the public through further diversification. The marketplace may be a proper "laboratory" for FCC policy-making. This is especially true with regard to new and untested communications technologies such as DBS; it is true even with respect to conventional radio and television broadcasting that have operated under regulations, such as the Seven Station Rule, that have not worked well in the past and are anachronistic at present. Yet, the view that the marketplace is an optimum "laboratory" cannot alone justify deregulation. The FCC must delineate the ground rules for its experimentation policies, and it must devote significantly more energy to monitoring the industry it regulates. Finally, the FCC should encourage through its regulatory powers active research and development aimed at creating economies of small scale distribution throughout the broadcast/video industries.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

. . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.

II
The Marketplace of Ideas

Justice Black, in *Associated Press v. United States*,[30] and Justice Holmes, in *Abrams v. United States*,[31] set out the touchstones of the Supreme Court's first amendment jurisprudence. In *Associated Press*, Justice Black stated: "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[32] In *Abrams v. United States*, Justice Holmes stated:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[33]

The idea that the first amendment is intended to preserve a "marketplace of ideas" in which competition will take the form of debate has informed Supreme Court decisions on defamation,[34] obscenity,[35] the advocacy of violence,[36] campaign spending,[37] and the editorial responsibilities of broadcasters.[38] All of these cases acknowledge that the system of self-government es-

30. 326 U.S. 1 (1945).

31. 250 U.S. 616 (1919).

32. 326 U.S. at 20.

33. 250 U.S. at 630 (Holmes, J., dissenting).

34. New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (holding that liability for defamation of a public official requires proof of actual malice): "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (holding that the *New York Times* rule does not apply to defamation of private individuals).

35. Roth v. United States, 354 U.S. 476, 484 (1957) (holding that "obscenity" is not protected speech): "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

36. Dennis v. United States, 341 U.S. 494, 503 (1951) (affirming convictions for advocating the overthrow of the Government under the "clear and present danger test"): "[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies."

37. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (upholding limits on campaign contributions and striking down limits on campaign spending): "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *See also* Federal Election

tablished by the Constitution requires that those who govern, the people, be well-informed.[39] As the Court said in *Buckley v. Valeo*, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."[40] The first amendment is, according to Professor Meiklejohn, not so much a "right" as a reservation of the sovereign power of the people: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."[41]

The Court, as a consequence, has at times referred to speech on political issues as the "most protected" speech under the first amendment.[42] At least one commentator has urged that the first amendment should protect *only* political speech.[43] The Court, though, has never gone this far; it has frequently noted that, in principle, the whole gamut of literary, social, scientific, artistic, and educational speech is protected.[44] It would seem, too, that such protection is a necessary underpinning to the individual citizen's power and responsibility to govern well. As Professor Meiklejohn pointed out:

> [V]oting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that

Comm'n v. National Conservative Political Action Comm., — U.S. —, 105 S. Ct. 1459 (1985) (striking down limits on campaign spending by independent groups).

38. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding the "fairness doctrine"); *see infra* notes 99-111 and accompanying text. For a detailed discussion of the role of the "marketplace" metaphor in Supreme Court decisions, *see* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-73 (1978).

39. *See, e.g., New York Times*, 376 U.S. at 274 (quoting James Madison): " 'The people, not the government, possess the absolute sovereignty.' "

40. 424 U.S. at 14-15.

41. Meiklejohn, *The First Amendment Is an Absolute*, 61 SUP. CT. REV. 245, 254-55 (1961).

42. *See, e.g.*, Federal Election Comm'n v. National Conservative Political Action Comm., 105 S. Ct. at 1467 (campaign expenditures at issue "produce speech at the core of the First Amendment"); *Buckley*, 424 U.S. at 14 (political expression deserves the "broadest protection" under the first amendment); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 (1978).

43. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

44. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762, 765 (1976) (holding that commercial speech is protected). The protection extends, at least, to ideas having "redeeming social value." Roth, 354 U.S. at 484; *see also Red Lion*, 395 U.S. at 390; *infra* notes 104-12 and accompanying text.

> freedom to govern lays upon them. That freedom implies and requires what we call "the dignity of the individual." Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.[45]

In other words, individual "dignity" or "self-fulfillment"[46] is not merely one of several values served by the first amendment, but is the primary value from which the capacity to govern is derived.[47]

The focus of first amendment protection should therefore be on the integrity of the individual who speaks and listens and not on speech as such. In the marketplace of ideas, however, this has not always been the case. There is an implied premise in first amendment jurisprudence that truth is objective and thus its existence and value readily discernible.[48] The marketplace metaphor depends on a notion that thoughts and ideas are discrete, value-laden things that can be held or discarded, compared, traded and sold. One result is that the scope of protection often depends on the measurable value of a particular kind of speech. Professor Baker has argued[49] that the premise is apparent in cases such as *Roth v. United States* in which the Court circumscribed a discrete set of speech called "obscenity" and determined it to be valueless,[50] and in *Dennis v. United States* in which the Court set up a kind of accounting system for measuring the "clear and present danger" of a particular expression.[51]

In other cases, though, the Court seems to have acknowledged the limits of the premise that ideas are easily circum-

45. Meiklejohn, *supra* note 41, at 255.

46. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1971), in which he describes four values that the first amendment serves: self-fulfillment; discovery of knowledge and truth; the ability to participate in decision-making (not exclusively political); and achievement of an adaptable, stable society. *See also* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

47. Baker, *supra* note 38, at 974-75, 990-91; Meiklejohn, *supra* note 41, at 255-56.

48. *See* Baker, *supra* note 38, at 974-76, tracing the notion that truth is objective to J. S. Mill's *On Liberty*. *See also* Meiklejohn, *supra* note 41, at 263. *But see* Bork, *supra* note 43, at 28 (assuming that, under an interpretation of the first amendment in which only political speech is protected, political "truth" is whatever the majority deems it to be).

49. Baker, *supra* note 38, at 968-73.

50. 354 U.S. at 484.

51. 341 U.S. at 510 (" 'whether the gravity of the "evil," discounted by its improbability, justifies the invasion of free speech.' ").

scribed. In *Gertz v. Robert Welch, Inc.*,[52] for example, the Court concluded that it could not fashion a rule of libel dependent upon protection of political *issues* because it could not readily distinguish among those ideas worthy of protection and those that are not.[53] *Gertz* and *New York Times Co. v. Sullivan*[54] instead crafted rules of libel which vary depending upon the status of the libeled party. The cases accord protection not to the content or value of the speech itself, but to the *process* of debate, on the one hand, and individual dignity on the other.[55]

This note assumes that, as Justice Frankfurter said, "[t]ruth and understanding are not wares like peanuts or potatoes."[56] It takes as a premise the belief that individual integrity and a humane intelligence are worthy goals of themselves and antecedent to informed governance. Therefore, this note also assumes that the first amendment should be understood to preserve the marketplace of ideas itself, and the vitality of its participants, and not just presumptive notions of the acceptable content of the exchange.

III
The Broadcast Marketplace

In broadcasting, economic competition and the first amendment meet. Congress, the FCC, and the Supreme Court have acknowledged that unregulated economic competition is likely to be inconsistent with a vital marketplace of ideas. The FCC has therefore promulgated, and the Supreme Court has ratified, both content[57] and ownership[58] regulations designed to protect the public's interest in robust debate from unfettered economic competition.

Of course, the newspaper industry has always been a central

52. 418 U.S. 323 (1974).

53. *Id.* at 337-39, 346 (rejecting the approach favored by Justice Brennan speaking for a plurality in Rosenbloom v. Metromedia Inc., 403 U.S. 29 (1971).)

54. 376 U.S. 254 (1964).

55. The law of defamation " 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.' " *Gertz*, 418 U.S. at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

56. Associated Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring).

57. *Red Lion*, 395 U.S. 367.

58. *FCC v. NCCB*, 436 U.S. at 795. *See also* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (upholding the Seven Station Rule).

forum for trade in ideas; yet, the Supreme Court has struck down laws directed at newspaper publishers similarly intended to "enhance" public debate.[59] The long tradition of uninhibited print journalism supports to some extent the Court's distinction between the print and broadcast media.[60] Ultimately, though, differences in the physical characteristics and attendant technology of the media have justified disparate first amendment standards. As the Court stated in *Red Lion*: "Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[61]

A. Characteristics of the Broadcast Medium

The impetus for the Communications Act[62] (and its predecessor Radio Act of 1927)[63] was the need to allocate scarce frequencies among more potential broadcasters than could be accommodated.[64] Uninhibited broadcasting by more than one station owner on the same frequency had resulted in a "cacophony of competing voices."[65]

Spectrum scarcity was not only an impetus, but also a legal justification for the Act's broad grant of regulatory power to the FCC.[66] Congress chose, in effect, to nationalize the airwaves.[67] Broadcasters are consequently licensed as public trustees of the publicly-owned electromagnetic spectrum.[68] Since the licensee has no property right to the frequency, but is a privileged fiduciary of its use, the public (acting through its representatives, the FCC) may attach qualifications designed to

59. Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a Florida "right of reply" statute applicable to newspaper publishers).

60. *Id.* at 248-54 (considering, but finding unpersuasive, significant evidence that the newspaper industry is no longer economically competitive or a source of robust debate).

61. 395 U.S. at 386.

62. 47 U.S.C.A. §§ 151-611 (West 1962 & Supp. 1984).

63. Radio Act of 1927, 44 Stat. 1162 (1927).

64. *Red Lion*, 395 U.S. at 375-77.

65. *Id.* at 376.

66. *Red Lion*, 395 U.S. at 376, 388-89; National Broadcasting Co. v. United States, 319 U.S. 190, 209-13 (1943). But see Bazelon, *FCC Regulation of the Telecommunications Press*, DUKE L.J. 213, 226-29 (1975), for a criticism of spectrum scarcity as a legal rationale.

67. "It is the purpose of this chapter . . . to provide for the use of such channels, but not the ownership thereof . . . ." 47 U.S.C. § 301 (1982).

68. *Red Lion*, 395 U.S. at 376-77.

protect the public interest.[69]

The "pervasiveness" of the medium is a related, but nonetheless distinct, aspect of broadcasting's unique character. Pervasiveness refers to the potential range and intrusiveness of radio and television broadcasts.[70] It is a product of the inherent physical characteristics of radio waves.[71] Because of radio's pervasiveness, and the ensuing overlap and chaos created by unmanaged delivery, spectrum space had to be allocated as a ministerial matter.[72] Further, the potential geographic range and psychological impact of radio broadcasts directed at a captive audience led legislators to fear the broadcasters' influential power.[73]

When Congress realized that a relative few could have access to the airwaves, it feared that the channels would become concentrated into even fewer, monied hands.[74] The broadcasting industry was, from the start, prone to excessive concentration. The early leaders in radio broadcasting were RCA, General Electric and Westinghouse.[75] Through a system of cross-licensing, they controlled the manufacture of radio apparatus and became known as the "radio trust."[76] They quickly recognized, too, the economic advantages of tying individual stations to-

69. *Id.* *See also* National Broadcasting Co. v. United States, 319 U.S. at 215-16; Fowler & Brenner, *supra* note 9, at 226-27.

70. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1979).

71. *Pacifica*, 438 U.S. at 748.

72. *Red Lion*, 395 U.S. at 387-88.

73. National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1202 (D.C. Cir. 1984).

In recent years, the pervasiveness of radio and television broadcasts in terms of their psychological impact on audiences, particularly children, has received a great deal of attention. In *FCC v. Pacifica Foundation*, the Supreme Court cited the "pervasiveness" of the broadcast medium as sufficient justification for the FCC's power to ban indecent (but not obscene) language from the airwaves. 438 U.S. at 748. The Court noted that broadcasts intrude into the privacy of the home, that they reach a captive audience unable to predetermine the content each time the receiver is turned on, and that "broadcasting is uniquely accessible to children." *Id.* at 748-49. The FCC's inquiries into the effects of television programming and advertising on children also acknowledge the "impact" problem. Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974), *aff'd*, Action for Children's Television, 564 F.2d 458 (D.C. Cir. 1977). Yet the concern is not just directed at children. The ban on cigarette advertising, *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), attests to a concern for all viewers. The Department of Justice, as well, has cited the greater impact of TV, as opposed to radio, advertising as a reason for regarding TV and radio advertising as separate product markets. Twelve Station Order, *supra* note 21, at para. 67.

74. *See infra* notes 107-23 and accompanying text.

75. B. COMPAINE, WHO OWNS THE MEDIA? 80 (1979).

76. *Id.*

gether through chain broadcasting arrangements.[77] Thus, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[78]

B. The Public Convenience, Interest and Necessity

Congressional recognition of the unique characteristics of the broadcast medium compelled delegation to the FCC of the authority to regulate "in the public convenience, interest, or necessity."[79] The FCC's authority includes both the power *and the duty* to regulate in the public interest. The enabling word in section 303 of the Act is "shall."[80] Therefore, while the Commission may have discretion to define the "public interest" in any particular circumstance,[81] and may choose the means to advance that interest,[82] it does not have discretion to ignore a relevant public interest or depart from prior conclusions about the public interest without reason.[83]

The use made of the broadcasting medium directly affects the public's interest in free speech. The Supreme Court has said that the public interest standard "necessarily invites reference to First Amendment principles."[84] The Court set out those principles in *Red Lion*:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee . . . . *It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*[85]

The Court does not use "monopolization" here in the narrow sense of a single firm's economic control over an entire market, but in the broader sense of any control in excess of relative par-

77. *Id.* Initially, RCA, GE, and Westinghouse jointly owned NBC's two radio networks.

78. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1939).

79. *Red Lion*, 395 U.S. at 375-77; National Broadcasting Co. v. United States, 319 U.S. at 209-13.

80. 47 U.S.C. § 303 (1985).

81. *FCC v. NCCB*, 436 U.S. at 793.

82. *Id.* at 793-96.

83. Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

84. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973).

85. *Red Lion*, 395 U.S. at 390 (emphasis added).

ity with other participants in the industry. After all, in *Red Lion* the Court upheld the fairness doctrine, which prohibits a broadcaster's complete "monopoly" control over even the content of her own broadcasts. The public has a right to receive access to virtually *all* ideas and experiences. The public interest, therefore, cannot countenance anything but a broadcasting system comprised of numerous, equally powerful speakers, unless one contends that any single speaker can convey adequately all ideas and experiences. Of course, the first amendment is based on the knowledge that the latter contention is contrary to human nature. Self-interest will always skew the choice and manner of speech. The FCC, as a result, is under an affirmative duty to diffuse the impact that the self-interest of broadcasters might have on the quality of public learning and debate.

IV
Diversification

A. The Rationale Behind Ownership Regulations

The primary purpose of the FCC's ownership rules is to limit the power that the relatively few owners of broadcast outlets have to control the process of debate.[86] The fear that an individual broadcaster might exert too much influence over her audience is a product of the technology that permits that broadcaster to amplify and extend her voice into hundreds of thousands of homes.[87] It is the technology of broadcasting that has justified the constitutional standard which gives priority to the first amendment rights of the listeners, rather than the speakers.[88] The FCC's ownership rules have been intended, in effect, to equalize the relative positions of speakers and listeners.[89] By limiting owners to a single outlet in any one city,[90] and by restraining the reach of group-owned stations,[91] the FCC has attempted to diffuse the impact that any one voice might have on its captive audience. For instance, as the Com-

86. *See supra* notes 56-72 and accompanying text.

87. *Red Lion*, 395 U.S. at 386-88.

88. *Id.* at 387. "The right of free speech of a broadcaster . . . or any other individual does not embrace a right to snuff out the free speech of others." *Id.*

89. *Id.* at 387-88.

90. 47 C.F.R. § 73.3555(a)-(c) (1984). *See supra* notes 2-3.

91. 47 C.F.R. § 73.3555(d) (1984). *See supra* note 4.

mission said in the *Newspaper/TV Order*,[92] in which the FCC banned future co-ownership of a newspaper and television station in the same local market: "This is a vitally important matter, for it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues."[93]

Content regulations such as section 315[94] and the fairness doctrine[95] derive from the same first amendment policy favoring diversification of available viewpoints.[96] The advantage to structural regulations—rules designed to control the ownership structure in the market—is that diversification can be promoted without direct interference into speech itself.[97] As the District of Columbia Court of Appeals noted with regard to the newspaper/TV co-ownership ban:

> In any event, the Constitutional difficulties with promoting diversity through speech restrictive means highlight the virtue of the prospective cross-ownership rules. The prospective ban is an attempt to promote diversity without government regulation of or supervision over speech. The rules attempt to promote vigorous public debate not by imposing restrictions on broadcasts, but simply by permitting more to be heard.[98]

Content regulations involve the government in decisions as to what shall be said.[99] Although the Supreme Court upheld the fairness doctrine, it did so in part because the broadcasters had not shown much resistance to its strictures and so had offered few opportunities for actual government interference.[100] The Court has also observed in *Columbia Broadcasting System v. Democratic National Committee* that the FCC has given broadcasters wide discretion as to how to comply with the doctrine.[101] But in that case the Court refused to take the logic of *Red Lion* one step further. It held that the first amendment

92. 50 F.C.C.2d 1046 (1975).

93. *Id.* at para. 99.

94. 47 U.S.C. § 315 (1982).

95. *See Red Lion*, 396 U.S. at 377-78.

96. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 950 (D.C. Cir. 1977), *aff'd in part, rev'd in part, FCC v. NCCB*, 436 U.S. 775 (1978).

97. *Id. See also* Bazelon, *supra* note 66, at 238.

98. *NCCB v. FCC*, 555 F.2d at 950.

99. *See, e.g., Miami Herald*, 418 U.S. at 254: "[I]mplementation of . . . an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment."

100. *Red Lion*, 395 U.S. at 392-93.

101. 412 U.S. at 118.

did not *require* broadcasters to sell time to individuals wishing to make political statements.[102] The Court in particular feared the constant governmental supervision that a "right-of-access" would require.[103] The Court has accepted the fairness doctrine, then, because in practice it has involved a very limited and benign FCC oversight of broadcast content.

The threshold difficulty with any content regulation, even if actual enforcement is benign, is deciding initially what content to regulate. The FCC, despite the Court's imprimatur on "the right of the public to receive suitable access to *social, political, esthetic, moral, and other ideas and experiences*,"[104] has focused its attention on the free flow of *political* ideas and issues of public controversy, rather than on the entire range of speech, artistic, social, or otherwise, that might be broadcast. Section 315,[105] the "equal time" provision for federal political candidates, is one example of the priority given to "political speech." The fairness doctrine, which requires a balance in the presentation only of issues of public controversy,[106] is another. The comparative hearing process,[107] as well, requires the FCC to weigh only the respective stations' non-entertainment formats in deciding which one will better serve the public interest.[108]

Yet the FCC has encountered the same problem with categorizing speech that the Supreme Court avoided in *Gertz*:[109] where does one draw the line between controversial political speech and non-controversial non-political speech? The Commission found itself compelled at one point to hold that the fairness doctrine required stations to air anti-cigarette statements on the ground that cigarette commercials implicitly asserted that smoking was healthy.[110] The decision haunted the FCC later as more groups urged the application of the fairness

102. *Id.* at 126-32.

103. *Id.* at 126-27.

104. 395 U.S. at 390 (emphasis added).

105. 47 U.S.C. § 315 (1982).

106. 395 U.S. at 375-79.

107. At a comparative hearing, the FCC chooses from among competing applicants for a broadcast license the one "who will provide the 'best practicable service to the public.'" Citizens Communications Center v. FCC, 447 F.2d at 1207.

108. WNCN Listeners Guild v. FCC, 450 U.S. 582 (1981).

109. *See supra* notes 52-55 and accompanying text.

110. *In re* WCBS, 8 F.C.C.2d 381, *aff'd on rehearing*, 9 F.C.C.2d 921 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

doctrine to a variety of commercial advertisements.[111] Ultimately, however, no matter what stance the FCC takes, any effort to control the content of broadcast speech will distort the debate that would otherwise take place.[112]

B. Congressional Mandate

The Communications Act of 1934[113] itself does not contain explicit provisions aimed at excessive ownership concentration. Congress understood, however, that the antitrust laws might not reach the kind of monopoly power that could choke free speech through control of the air waves. The Communications Act, for instance, grants the FCC the authority to promulgate regulations restricting chain broadcasting.[114] Section 314 specifically prohibits radio companies from acquiring or controlling telegraph or telephone companies, or vice versa, if "the effect thereof may be to substantially lessen competition or to restrain commerce."[115] Section 313(a) extends the antitrust laws to the manufacture and trade in "radio apparatus and devices," and empowers the courts to revoke the license of an antitrust violator in addition to any other penalties.[116] Section 313(b) similarly requires the FCC to refuse a new license to any antitrust violator whose license previously has been revoked.[117] Together, these sections express Congressional intent that the FCC itself take the necessary steps to prevent excessive ownership concentration in the broadcast industry.

Congress, when it debated and passed the Communications

111. *See* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 775-77 (1972).

112. The FCC is coming around to this view. In WNCN Listeners Guild v. FCC, 450 U.S. 582 (1981), the Court affirmed the FCC's conclusion that selection of radio station entertainment formats should be left to market forces. Recently, the FCC conducted public hearings into whether the Commission should repeal the fairness doctrine. It is no secret that the Commission Chairman, Mark Fowler, favors repeal. *See* Fowler and Brenner, *supra* note 9. The Commission finally, and reluctantly, decided to retain the fairness doctrine. *See supra* note 16.

113. 47 U.S.C.A. §§ 151-611 (West 1962 & Supp. 1984).

114. 47 U.S.C. § 303(i) (1982). The television networks are "chain broadcasting" arrangements. The Supreme Court upheld the FCC's power to regulate chain broadcasting in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

115. 47 U.S.C. § 314 (1982). This section echoes both the anti-merger language of the Clayton Act, 15 U.S.C. § 18 (1982) and the restraint of trade proscriptions of the Sherman Act, 15 U.S.C. § 1 (1982). The section therefore appears to be redundant.

116. 47 U.S.C. § 313(a) (1982). This section is also largely redundant since the antitrust laws do not contain an exception for radio manufacturers.

117. 47 U.S.C. § 313(b) (1982).

Act in 1934, must have been aware of the legislative history of the Sherman Act.[118] The Sherman Act has been subjected to varying critical interpretations,[119] but it is commonly understood that the it is primarily intended to attack economic ineffiency.[120] The Sherman Act was not intended to apply to monopolies gained solely through superior efficiency, skill and business acumen.[121] The courts, moreover, have accepted and applied this interpretation.[122] By 1934, technological acumen had already given companies like RCA and Westinghouse a head start in the broadcasting field.[123] Thus, Congress had cause to be concerned that a few giants might dominate broadcasting, despite the antitrust laws, if the FCC did not retain the authority to protect opportunities for the dissemination of varied opinions on public issues. As one Congressman said earlier:

> There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. As a means of entertainment, education, information and communication it has limitless possibilities. The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. If the development continues as rapidly in the future as in the past, it will only be a few years before these broadcasting stations, if operated by chain stations, will simultaneously reach an audience of over half of our entire citizenship, and bring messages to the fireside of nearly every home in America. They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and Ameri-

118. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

119. *See* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

120. *See infra* notes 262-80 and accompanying text.

121. Bork, *supra* note 119, at 29-30; Pitofsky, *supra* note 119, at 1057.

122. *See, e.g.*, United States v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 390 (1956); California Computer Prods. v. IBM, 613 F.2d 727, 735 (9th Cir. 1979). *But see* R. BORK, THE ANTITRUST PARADOX 164-72 (1978) (observing that the courts have not consistently applied this interpretation).

123. *See supra* notes 75-77 and accompanying text. Congressmen debating the Radio Act of 1927 were aware that the Federal Trade Commission had filed suit in 1924 against the radio manufacturers for antitrust violations. As of 1926 the suit was still pending and skepticism was expressed as to whether the suit would successfully restrain the manufacturers' powers, at least in any reasonable time period. 67 CONG. REC. 5478, 5481 (1926) (statement of Rep. Davis).

> can politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a Republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.[124]

The problem was, and is, that economic inefficiency is not the only adverse consequence of monopolization of the broadcasting industry. Whether a monopoly is attained through conspiracy,[125] through predatory acts in furtherance of monopoly power,[126] through unfair business practices,[127] or through innocent skill,[128] Congress and the public cannot countenance a private stranglehold on the communications channels.[129]

C. The Ownership Rules

1. *Rulemaking Authority*

Congress gave the FCC jurisdiction over "a field of enterprise the dominant character of which was the rapid pace of its unfolding."[130] The FCC enacted blanket ownership rules in order to check accretions of economic and editorial power on the assumption that ad hoc regulation could not adequately monitor and control the pace of change.[131] In its order prohibiting ownership of more than one broadcast license of any kind in a local market, the Commission stated that its enabling policy was diversification.[132] It stated further:

> [T]he governing consideration here is power, and power can be

124. 67 CONG. REC. 5557, 5558 (1926) (statement of Rep. Johnson).

125. *See* 15 U.S.C. § 1 (1982) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce").

126. *See* 15 U.S.C. § 2 (1982) (punishing "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce").

127. *See* 15 U.S.C. § 45 (1982) (declaring unlawful any unfair methods of competition or any unfair or deceptive practices in or affecting commerce).

128. *See supra* notes 121-22 and accompanying text.

129. Newspaper/TV Order, *supra* note 7, at para. 14: "The significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation . . . ."

130. National Broadcasting Co. v. United States, 319 U.S. at 219.

131. *NCCB v. FCC*, 555 F.2d at 944.

132. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22

realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result.[133]

2. *Local Ownership Rules*

Most of the multiple ownership rules are designed to diversify the ownership of stations in each local market. The Commission, in separate orders between 1940 and 1943, prohibited ownership of more than one license in the *same* broadcast service in the same local market (the "duopoly" rule).[134] The Commission amended the latter rules in 1964 to define explicitly the service area in which such ownership combinations would be prohibited.[135] In 1970, the Commission decided to deny *any* license to the owner of *any other* broadcast service within the same market (the "one-to-a-market" rule).[136] At the same time, the Commission initiated an inquiry into ownership of both a newspaper and broadcast license in the same market.[137] The inquiry resulted in the *Newspaper/TV Order* banning, prospectively, common ownership of a newspaper and broadcast station in the same market.[138] Subsequently, the

F.C.C.2d 306, para. 16 (1970) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945), and Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

133. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d at para. 20. The law *is* clear that the FCC has the authority to promulgate broad structural regulations. *See FCC v. NCCB*, 436 U.S. at 796-97 ("'[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'"); *see also* United States v. Storer Broadcasting, 351 U.S. 192, 202-03 (1956).

134. *See* Multiple Ownership of Standard Broadcast Stations (AM radio), 8 Fed. Reg. 16,065 (1943); Rules and Regulations Governing Commercial Television Broadcast Stations, 6 Fed. Reg. 2284, 2284-85 (1941); Rules Governing Standard and High Frequency Broadcast Stations (FM radio), 5 Fed. Reg. 2382 (1940).

135. Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964) (defining the service area of a station by the reach of its signal at a stated power output).

136. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *as modified*, 28 F.C.C.2d 662 (1971) (codified at 47 C.F.R. § 73.3555(b)) (the modification vacated the rule's application to AM-FM and UHF-radio combinations).

137. Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F.C.C.2d 339 (1970).

138. Newspaper/TV Order, *supra* note 7, at 102.

FCC also banned local cable television/broadcast television combinations.[139]

The local ownership rules are a part of the FCC's broader "localism" policy. Under this policy, the FCC has attempted to license stations to individual owners who would serve the needs and desires of the local community.[140] The ownership rules ensure that many local broadcast voices will be in place to respond to local issues and interests, and that the influential impact that any one voice might have on the local audience will be diffused.[141]

3. *The Seven Station Rule*

The FCC promulgated the Seven Station Rule in 1953.[142] The rule prohibited a single person from holding a cognizable interest in more than seven AM, seven FM, and five television stations.[143] The Commission at that time declined to make any distinction between VHF and UHF stations.[144] Later the Commission amended the rule to permit ownership of a total of seven television stations if no more than five were VHF stations.[145] In announcing its decision to set overall ownership limits, the Commission said:

> Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any

139. Second Report and Order in Docket No. 18,397, 23 F.C.C.2d 816 (1970) (codified at 47 C.F.R. § 76.501 (1984)).

140. Twelve Station Order, *supra* note 21, at paras. 6, 10, 34-43. For example, until recent deregulation, radio and television operators were required to follow formal procedures for "ascertaining" the broadcasting needs and interests of the local community. *See* Deregulation of Television, *supra* note 9, at paras. 45-54; Deregulation of Radio, *supra* note 9, at paras. 55-72. *Cf.* National Ass'n of Broadcasters v. FCC, 740 F.2d at 1197-98 (holding that the Communications Act does not *require* purely local service to the exclusion of technologies such as DBS).

141. Twelve Station Order, *supra* note 21, at paras. 8, 31-43.

142. Amendment of sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 18 F.C.C. 288 (1953), *aff'd sub nom.* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Ownership Report and Order].

143. *Id.* at paras. 16-18.

144. *Id.* at para. 15.

145. 47 C.F.R. § 73.3555(d) (1984).

governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee.[146]

In *United States v. Storer Broadcasting Co.*,[147] the Supreme Court upheld the Commission's authority to create the multiple ownership limits. The Court pointed out that the Commission had broad rulemaking authority under section 154(i)[148] and under section 303(r)[149] to protect the public interest.[150] Moreover, the Court said, "[i]ts authority covers new and rapidly developing fields."[151] The FCC, it said, was not limited to making ad hoc decisions after notice and a full hearing in each case.[152] The Court noted further that Congress specifically intended that the Commission would "assure fair opportunity for open competition in the use of broadcasting facilities. . . . We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole."[153]

D. Competing Interests and Necessities

The FCC nonetheless has been forced to accommodate competing concerns. Its charter unambiguously empowers the Commission to promote industry expansion and progress.[154] The Supreme Court has acknowledged, too, that the Commission's "other, and sometimes conflicting, goal has been to ensure 'the best practicable service to the public.' "[155] Diversification has therefore been given low priority at times in order to encourage journalistic expertise, to allow firms to take advantage of efficient business arrangements, and to avoid disruption of service.

1. *Promoting Journalistic Expertise*

In the early years of radio and TV development, the Commission did not discourage,[156] and sometimes actively promoted, local newspaper and TV or radio combinations.[157] Initially, it was

146. Ownership Report and Order, *supra* note 142, at para. 10.
147. 351 U.S. 192.
148. 47 U.S.C. § 154(i) (1982).
149. 47 U.S.C. § 303(r) (1982).
150. 351 U.S. at 203.
151. *Id.*
152. *Id.* at 202-03.
153. *Id.* at 203-04.
154. 47 U.S.C. § 303(g) (1982).
155. *FCC v. NCCB*, 436 U.S. at 782.
156. Newspaper/TV Order, *supra* note 7, at paras. 62-63.
157. *See* Note, *Diversification and the Public Interest: Administrative Responsi-*

felt that radio and television were not sources of serious journalism.[158] Newspaper publishers offered journalistic expertise and the necessary capital to absorb losses during broadcasting's infancy.[159] In the *Newspaper/TV Order*, however, the Commission determined that broadcasting had "matured" and that the need to cross-fertilize broadcasting operations with a publisher's expertise was "no longer generally operative."[160]

2. *Industry Stability*

The FCC may consider diversification along with other factors in choosing between competing license applicants.[161] Nonetheless, the FCC has routinely granted new licenses to experienced broadcasters, despite the increase in concentration that results, rather than license unaffiliated and untested applicants.[162] On renewal application, an unaffiliated applicant has rarely displaced a more concentrated licensee.[163] In 1970, moreover, the Commission adopted a comparative hearing policy statement that would have removed diversification as a criterion for judging license candidates.[164] The new policy gave highest priority to "the value of not undermining predictability and stability of broadcast operation."[165] The District of Columbia Court of Appeals struck down the 1970 policy statement in *Citizens Communications Center v. FCC*.[166] Since that time, the Commission has adopted a "policy of refusing to consider questions of concentration of control unless specific abuses are shown. . . . [A]bsent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such arguments would raise valid is-

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bility of the FCC, 66 YALE L.J. 365, 372 n.39 (1957) (noting the strong Congressional support for newspaper ownership); Newspaper/TV Order, *supra* note 7, at para. 100: "While there can be no doubt that newspaper brought a pioneering spirit to broadcasting . . . the special reason for encouraging newspaper ownership, even at the cost of lessened diversity, is no longer generally operative in the way it was."

158. Bazelon, *supra* note 66, at 219-20.

159. Newspaper/TV Order, *supra* note 7, at para. 100.

160. *Id.*

161. McClatchey Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) (denying a license to a newspaper and broadcast station owner in favor of an unaffiliated applicant).

162. Note, *supra* note 157, at 376-79.

163. *Id.* at 379-80.

164. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970).

165. *Id.* at para. 126.

166. 447 F.2d 1201 (D.C. Cir. 1971).

sues."[167] The District of Columbia Circuit has approved this approach.[168] In the comparative hearing context, then, industry stability takes priority over diversification. To the extent that diversification of ownership is a factor at all, "diversification" has been equated with the kind of economic competition which the antitrust laws are designed to protect.

Industry stability has also been a factor in the ownership rulemaking proceedings. When the FCC adopted the one-to-a-market rule in 1970, it decided not to require divestiture of existing combinations.[169] The Commission reaffirmed this view in the *Newspaper/TV Order*, finding that "stability and continuity of ownership do serve important public purposes."[170] On appeal, the Supreme Court vindicated the FCC's authority to give priority to industry stability in refusing to require divestiture.[171]

3. *Economies of Scale*

The FCC has recognized and accepted the idea that promoting the economic progress of the industry requires that it allow firms to tap economies of scale.[172] The three networks have thrived by taking maximum advantage of economies of large-scale distibution offered by chain broadcasting arrangements.[173] Network affiliation allows local broadcast stations to acquire programming without having to pay the entire cost of production.[174] Program producers, on the other hand, can distribute their programs nationally and pay only the one transaction cost of a sale to a network.[175] Advertisers also need not deal directly with every individual outlet in which they desire to place a promotion.[176] Thus, the networks command a position of maxi-

167. Newspaper/TV Order, *supra* note 7, at paras. 129-30.

168. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

169. 22 F.C.C.2d at para. 14.

170. Newspaper/TV Order, *supra* note 7, at paras. 30, 109.

171. *FCC v. NCCB*, 436 U.S. at 805. *See also* Cable Television Systems and Postponement of Divestiture Requirement, Final Rule, 49 Fed. Reg. 23348 (June 6, 1984) (grandfathering all existing non-egregious cable/broadcast television ownership combinations).

172. Twelve Station Order, *supra* note 21, at para. 82.

173. *See generally* B. OWEN, J. BEEBE & W. MANNING, TELEVISION ECONOMICS 18-20 (1974); B. COMPAINE, WHO OWNS THE MEDIA? 110-13 (1979).

174. B. OWEN, J. BEEBE & W. MANNING, *supra* note 173, at 17-20.

175. *Id. See also* B. COMPAINE, *supra* note 173, at 110-13.

176. B. COMPAINE, *supra* note 173, at 111.

mum economic leverage in the broadcasting industry.[177]

Ironically, network chain distribution has been a necessary economic consequence of the FCC's "localism" policy.[178] It is economically impractical for each station owner to produce all of her programming.[179] Because broadcast station owners, due to the localism policy and the local ownership rules, can serve only a part of a small isolated market, they are forced to gain access to economies of scale through network affiliation contracts. Network affiliation serves as a source of cheap entertainment and news programming through which to sell advertising.[180]

The fact that only three networks dominate the broadcast marketplace may be due to the FCC's aggressive efforts to expand the broadcasting industry.[181] The FCC, until 1948, allocated only VHF stations and gave these to the larger and more experienced broadcasters.[182] Between 1948 and 1952, the Commission granted no new television licenses.[183] When, in 1952, the FCC resumed licensing of both VHF and UHF stations, UHF entered the market at a distinct disadvantage.[184] First, UHF is an inherently weaker, narrower-range signal.[185] Second, most of the television sets that had been sold before 1952 received only VHF signals.[186] There was little economic incentive for the existing networks to affiliate with UHF stations, or for new networks to form around them.[187] And it was in 1953 that the Commission adopted the Seven Station Rule. While the Rule may have halted any further accretion of network

177. *See generally id.* at 102-13; *see also* United States v. National Broadcasting Co., 449 F. Supp. 1127, 1129-30 (C.D. Cal. 1978) (noting the great advantage in bargaining power that the networks hold over program suppliers), *aff'd mem.*, 603 F.2d 227 (9th Cir. 1978), *cert. denied sub nom.* CBS, Inc. v. United States, 444 U.S. 991 (1979).

178. B. COMPAINE, *supra* note 173, at 13.

179. *See supra* notes 172-77 and accompanying text.

180. Local network affiliates retransmit, or "clear," over 90% of the programming offered by the networks. Twelve Station Order, *supra* note 21, at para. 71.

181. B. COMPAINE, *supra* note 173, at 13; Note, *supra* note 157, at 391-94. *See supra* notes 154-71 and accompanying text.

182. Note, *supra* note 157, at 391.

183. *Id.*

184. *Id.* at 392.

185. *Id.*

186. *Id.* The concern has arisen again in the context of DBS. Opponents of the FCC's loose regulatory policy argued that the original licensees, Satellite Television Corporation in particular, would set *de facto* technical standards for the industry. The FCC rejected these arguments. *See* DBS Order, *supra* note 18.

187. Note, *supra* note 157, at 392.

power, it appears that the Rule, in combination with the disenfranchisement of UHF stations, also helped to bar the development of new, competing networks.[188] The FCC's aggressive promotion decisions thus locked in three overpowering voices on the nation's airwaves.[189]

The FCC has approached diversification through ownership rules by means of broad prophylactic measures. Though locally-oriented broadcasting was intended to create a multitude of relatively co-equal voices, it set the stage for network control over advertising revenues and programming selection. As the fare offered by the three networks attests, networking tends to absorb whatever diversity of local voice might exist into a single national voice.[190] At the same time, policies designed to aid the economic growth of the industry often took priority over first amendment diversification concerns.[191] The FCC today continues to give higher priority to economic growth than it does to diversification. The FCC has already deleted diversification as a criterion from contested license renewal hearings.[192] Diversification also does not completely control the ownership rulemaking process.[193] The recent efforts to deregulate ownership may remove diversification completely from the FCC's definition of the public interest.

E. Deregulation

1. *The Twelve Station Order*

After publishing a *Notice of Proposed Rule Making,*[194] and having received comments and held hearings, the Commission decided in August 1984 to amend the Seven Station Rule.[195] The decision represented one of the most radical efforts to date by the FCC to deregulate the broadcasting industry. As amended, the ceiling on multiple ownership of AM, FM, and

188. *See infra* notes 217-20 and accompanying text.

189. The FCC did later raise the TV ownership limit to 7 stations, if 2 were UHF. 47 C.F.R. § 73.3555(d) (1984). In the recent Twelve Station Order, though, it was only on reconsideration under intense Congressional pressure that the FCC accommodated UHF's inherent disadvantage. *See infra* notes 237-47 and accompanying text.

190. *See supra* notes 178-80 and accompanying text.

191. *See supra* notes 154-71, 181-89 and accompanying text.

192. *See supra* notes 164-68 and accompanying text.

193. *See supra* notes 169-71 and accompanying text.

194. Amendment of Sections 73.35, 73.240, and 73.636 of the Commision's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Notice of Proposed Rule Making, 95 F.C.C.2d 360 (1983).

195. Twelve Station Order, *supra* note 21.

TV stations was to be raised to twelve in each category.[196] More significant, however, was the added "sunset" provision: in six years, 1990, all limits were to be removed.[197]

Chairman Mark Fowler, speaking for the Commission, argued that the transformation of the broadcasting and video communications industries over the past three decades had eliminated any need for blanket limits.[198] Diversification remained a vital policy, he said; changed circumstances, though, had made moot the need for broad presumptive restrictions.[199]

First, the FCC said, spectrum space is no longer a scarce commodity.[200] It pointed out that the number of radio stations had tripled to over 9,000 outlets in the years since the Seven Station Rule was adopted.[201] Six times as many television stations, almost 1,200, were now broadcasting.[202] In the last decade alone the expansion of cable TV to over 6,400 systems reaching almost two-thirds of the nation's households indicated to the FCC that the scarcity argument was moot.[203] According to the Commission, new technologies such as MDS, LPTV, DBS and video cassette recorders, warranted a finding that the broadcast market was competitive enough not to require stringent ownership limits.[204]

Second, the FCC insisted that any pervasive influence of the broadcast media had been diffused by the "multitudinous alternative outlets for the expression of ideas and the diversity of conflicting opinions and ideas among broadcast outlets themselves."[205] The opinion noted as well the FCC's skepticism that pervasiveness alone as a ground for a different first amendment regime could withstand constitutional scrutiny.[206]

Third, the Commission emphasized its belief that the rele-

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196. *Id.* at para. 5.
197. *Id.*
198. *Id.* at para. 4.
199. *Id.* at paras. 4-5.
200. *Id.* at para. 7.
201. *Id.* at para. 4.
202. *Id.*
203. *Id.*
204. *Id.* at paras. 4, 30.
205. *Id.* at para. 8.
206. *Id.* (citing Buckley v. Valeo, 424 U.S. 1 (1975) and First Nat'l Bank v. Bellotti, 435 U.S. 765 (1977)). *See also* Bazelon, *supra* note 66, at 221-22. No different first amendment regime is necessary to justify *structural*, as opposed to *content* regulations. Pervasiveness nonetheless remains an inherent attribute of the medium.

vant market for diversity concerns is the local one.[207] It is the local supply of TV and radio broadcasts, newspapers, magazines, movies, etc., to which consumers look for information and entertainment.[208] Since the local ownership rules—the duopoly[209] and one-to-a-market rules[210]—will remain in place,[211] the Commission said, any increase in concentration nationally will not affect the diversity of local supply.[212]

Finally, the Commission devoted attention to its findings on "The Effect of Group Ownership on Viewpoint Quality."[213] The FCC relied primarily upon studies submitted by the National Association of Broadcasters (NAB) for its finding that group ownership of stations is beneficial.[214] The studies showed that group owners devote more time and money to independent news programming and public affairs programs than do independent owners.[215] Moreover, there was no evidence that the networks imposed a "monolithic" editorial viewpoint upon their owned and operated stations.[216]

The networks and the smaller group owners supported the amendment. Metromedia Inc. agreed that the ownership limits had perversely discouraged the appearance of strong independent voices.[217] It pointed out that the ownership limits had effectively prevented alternative groups from establishing a base of outlets with which to garner national advertising funds.[218] It noted that removal of the limits would allow new networks, and ad hoc networks, to form around owned and operated stations reaching a significant share of the nation's households.[219] Metromedia argued, and the FCC agreed, that only by permitting larger station groups to form would owners be able to tap sufficient economies of scale, i.e., more efficient distribution

207. Twelve Station Order, *supra* note 21, at para. 32.

208. *Id.*

209. 47 C.F.R. § 73.3555(a) (1984).

210. 47 C.F.R. § 73.3555(b) (1984).

211. Twelve Station Order, *supra* note 21, at paras. 32, 43.

212. *Id.* at paras. 31-43. *See supra* notes 140-41, 178-80 and accompanying text for a discussion of the FCC's "localism" policy.

213. Twelve Station Order, *supra* note 21, at paras. 44-59.

214. *Id.* at para. 45. The NAB is an industry trade association formed to protect and promote broadcast interests. *See* Note, *A Tale of Two Standards: Antitrust, the Public Interest, and the Television Industry*, 6 COMM/ENT L.J. 887, 889 (1984).

215. Twelve Station Order, *supra* note 21, at paras. 45-50.

216. *Id.* at para. 52.

217. *Id.* at paras. 57-58 (citing *Comments of Metromedia, Inc.* at 25-27).

218. *Id.*

219. *Id.*

schemes and organizational structures, to be able to devote resources to independent news and entertainment programming.[220]

The DOJ submitted its study of the effects of the rule change on competition. The DOJ defined the product markets as the markets for television and radio advertising.[221] The DOJ concluded that since the networks already dominate the national advertising market and since affiliates "clear" over 90% of network programming, even if the networks were to buy their affiliates, there would be no less competition at the national level.[222] And if smaller group owners in fact increase their shares, the rule change would increase competition on the national level.[223] As for local advertising, the Department observed that revenues come from local sources.[224] Since the amendment does not affect local concentration, it will have no effect on local competition.[225] As an additional finding, DOJ measured the level of economic concentration in the broadcasting industry. The Herfindahl-Hirschman Index for the television industry, based on revenues, was 229.[226] When calculated according to audience share, the Index yielded a value of 115.[227] The threshold level raising antitrust concerns is 1000.[228]

The FCC concluded that the potential efficiency gains from new and larger networks were worth pursuing.[229] Economies of scale created by ownership access to a greater number of outlets, it said, are likely to support new independent news-gath-

220. *Id.* at paras. 57-58, 82. *See supra* notes 172-77 and accompanying text.

221. *Id.* at para. 67. The distinction was based on the perceived greater impact of television advertising on audiences.

222. *Id.* at para. 71.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at para. 74. The Herfindahl-Hirschman Index (HHI) is a measure of the relative economic concentration in an industry. It is calculated by adding the squares of the market share percentages of the individual participants. 1800 is considered highly concentrated. *See generally* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 302-03 (1985).

227. Twelve Station Order, *supra* note 21, at para. 74. CBS calculated the audience share HHI. The calculation underscores the difficulty of applying standard antitrust measures to the broadcasting industry. CBS's calculation was based on owned stations and found that no single owner's share exceeded 3.8%. But through affiliation contracts, the three networks routinely garner 17-18% each of the prime-time audience. The HHI for such a measure would exceed 800 for the networks alone, and over 1000 for the entire industry.

228. H. HOVENKAMP, *supra* note 226, at 302-03.

229. Twelve Station Order, *supra* note 21, at para. 82.

ering services and public affairs programming.[230] Those with superior skills should be encouraged to apply them to more stations.[231] And even larger networks might tap as yet undiscerned economies of scale.[232] In any event, the FCC reasoned, the accuracy of their predictions should be tested.[233] The FCC saw no reason to distinguish the three major networks from other group owners under the terms of the rulemaking proceeding.[234] Finally, the FCC promised to scrutinize individual transactions.[235] The Commission summarized the policy behind the amendment to the Seven Station Rule in the following statement:

> The Supreme Court has instructed that the public interest standard that governs the Commission's policies invited reference to First Amendment principles. . . . A cherished First Amendment principle crowns speech that addresses political or public affairs with maximum constitutional protection because of its centrality to efficacious democratic government. . . . The record in this proceeding demonstrates that network and group owners offer the electorate more. Accordingly, fidelity to First Amendment values and the public interest counsels the Commission against rules or policies that could artificially restrict group ownership.[236]

Congress immediately raised a hue and cry.[237] It slapped a moratorium on implementation of the new Twelve Station Rule[238] and the FCC was forced to reconsider. After collecting additional comments, the FCC changed its position and

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230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at para. 86.

234. *Id.* at paras. 97-107. The DOJ regards network ownership of stations as a form of vertical integration. *Id.* at para. 97. The DOJ in general favors vertical mergers as efficiency-producing structures. *Id.* at para. 98. *See generally* H. HOVENKAMP, *supra* note 226, at 191-212. *See also* 1984 Justice Department Merger Guidelines, 49 Fed. Reg. 26,823 (1984). The DOJ concluded that given the local ownership rules, vertical integration would not produce anti-competitive effects. Twelve Station Order, *supra* note 21, at paras. 98-102.

235. Twelve Station Order, *supra* note 21, at para. 108.

236. *Id.* at paras. 54-55.

237. *Concern Arises in Congress Over FCC Ownership Action*, BROADCASTING, July 30, 1984, at 30-31 (July 30, 1984). The article notes that Rep. Timothy Wirth (D. Colo.), Chairman of the House Telecommunications Subcommittee, told Fowler that his committee doubted that the antitrust laws could adequately protect diversification. *Id.* at 31.

238. *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984).

promulgated a modified Twelve Station Rule on February 1, 1985.[239]

On reconsideration, the FCC added an audience reach cap equal to 25% of the national audience.[240] Since each of the three major networks currently reaches about 20% of the national audience through its owned and operated stations,[241] the cap curtails the ability of these networks to grow significantly larger. In addition, the new rule distinguishes between VHF and UHF stations by attributing only half of a UHF station's audience reach to the cap calculation.[242] The FCC inserted other provisions to encourage minority ownership of stations.[243] Finally, the rule is intended to be permanent; the Commission deleted the six-year sunset provision.[244]

The Commission's opinion on reconsideration was laconic. It devoted more time to reasserting the validity of the original repeal of the Seven Station Rule than it did to explaining the newest modifications. The Commission stated that the audience cap was added to account for the differences in size among local markets.[245] The Commission's goal was to prevent the larger group owners from growing even larger by acquiring stations in the largest markets, leaving the smallest group owners, locked into the smaller markets, to fall farther behind.[246] The UHF exception similarly was an attempt to bring less attractive properties into the development of new networks.[247]

Commissioner Dawson had dissented vehemently in the August *Order*, arguing that an audience reach cap alone best advances diversification interests.[248] She observed that a percentage cap by itself would most likely produce groups of relatively equal size and no group owner would dominate.[249] In

239. Twelve Station Order Reconsidered, *supra* note 23.

240. *Id.* at para. 3

241. Twelve Station Order, *supra* note 21 (dissenting statement of Commissioner Mimi Weyforth Dawson).

242. Twelve Station Order Reconsidered, *supra* note 23, at paras. 42-44.

243. *Id.* at para. 45. The amendment permits an ownership interest in as many as 14 stations in a category if at least two are minority controlled.

244. *Id.* at para. 3.

245. *Id.* at para. 36.

246. *Id.*

247. *Id.* at paras. 42-44. Ironically, the opinion notes: "We find that the discount system adopted herein properly reflects the Commission's historical concern with UHF television." *Id.* at para. 44. *See supra* notes 181-87 and accompanying text for a discussion of the Commission's early *lack of concern* for UHF stations.

248. *See supra* note 241.

249. *Id.*

the February *Order*, she concurred in part.[250] She reiterated her approval of the audience cap, but pointed out that the numerical cap continues to handicap smaller group owners, "since those group owners will almost certainly reach the numerical cap long before they reach the percentage cap."[251]

2. *A Passive Diversification Policy*

In the *Twelve Station Order*, the FCC examined the proposed repeal of the Seven Station Rule in light of its effects on both the diversification of viewpoints and economic competition.[252] The Commission, in keeping with its own definition of the public interest, seemed to pay most attention to the effects on diversification of viewpoints. The *Twelve Station Order*, however, departs from prior FCC policy by adopting a passive approach to diversification.

The FCC has traditionally operated under the belief that the effects of ownership concentration on the available diversity of viewpoints is impossible to measure.[253] The motivating principle has thus been that more outlets for voices are necessarily better than fewer. In the *Twelve Station Order*, on the other hand, the FCC proposed to repeal the ownership limits based on a survey of the sheer numbers of outlets available,[254] and based on incomplete and biased studies of the effect of group ownership on viewpoint quality provided by interested broadcasters.[255]

The sheer increase in the number of outlets alone does not accurately indicate the extent, if any, of the increase in viewpoint diversity. Many of those new outlets will offer duplicative programming if owned by a group owner, if affiliated with

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250. Twelve Station Order Reconsidered, *supra* note 23 (separate statement of Commissioner Mimi Wayforth [*sic*] Dawson Concurring in Part).

251. *Id.* On the date the Twelve Station Order Reconsidered was released, February 1, 1985, the Taft Broadcasting Company announced an agreement to buy five television stations and seven radio stations from Gulf Broadcasting Co. The sale will raise Taft's holdings from seven to twelve TV stations, and from thirteen to twenty radio stations. The audience reach of its TV stations will increase from 9% to 15% (apparently not accounting for UHF stations). *See Taft to Buy 12 Stations From Gulf Broadcast*, N.Y. Times, Feb. 2, 1985, at 19, col. 5. Commissioner Dawson seems to have been correct: Taft has reached the numerical cap long before reaching the audience reach cap.

252. Twelve Station Order, *supra* note 21, at paras. 24-63 (viewpoint diversity), 64-86 (economic competition).

253. *See supra* notes 97-98, 130-33 and accompanying text.

254. Twelve Station Order, *supra* note 21, at paras. 34-36.

255. *Id.* at paras. 44-59.

one of the networks or, in the case of radio, if programming is purchased from a packaged format supplier. The FCC did not offer statistics on the increase in the number of owners since the Rule was passed, or in the respective ratios of owners to outlets.

The studies offered on the effects of group ownership on viewpoint quality rely in part on flawed premises. The Parkman study noted that group-owned stations have higher local news show ratings.[256] But the audience-rating criterion fails to take into account the well-known habit of viewers of watching a program just because they decline to change the channel. The news show ratings are therefore in part a rating of programs preceding and following the show.

The National Association of Broadcasters ("NAB") offered its own study showing that group-owned stations provide more local news and public affairs programming.[257] Whether certain issues are covered at all, or in depth, is relevant to viewpoint diversity. Measures of quantity alone, though, do not also measure the quality and diversity of the opinions expressed.

The FCC also cited a study provided by NAB which concluded that many group-owned stations pursue editorial policies independently of the group-owner.[258] The fact that a separate editorial board is in place to make day to day decisions is some evidence of editorial independence. The group-owner will nonetheless exert some controlling influence through hiring choices and through other organizational and financial pressures.

All of the studies also suffer from a myopic attention to news programming as the relevant measure of diversity. True, news programming is the most obvious manifestation of a programmer's viewpoint, but not by any means the only one. The decision whether or not to air, or if aired, whether or not to edit, a series such as *MASH* or a documentary such as *Death of a Princess*, is an editorial decision which affects, and is affected by the station's overall viewpoint.

The studies submitted only reinforce the previously-accepted premise that it is impossible to measure accurately the effects of ownership concentration on viewpoint diversity. The prem-

256. *Id.* at para. 44.
257. *Id.* at paras. 45-46.
258. *Id.* at para. 52.

ise follows from an understanding of what is at stake in the marketplace of ideas. It is important not just to report most or all of the news, but to report the news from a variety of perspectives, to comment and debate on the issues raised, and to see and hear the innumerable other experiences and ideas generated by modern living. Therefore, as the FCC once stated:

> A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. . . . No one can say that present licensees are broadcasting everything worthwhile that can be communicated.[259]

In other words, the FCC cannot reasonably retreat from a policy of affirmatively advancing the diversification of media viewpoints. The *Twelve Station Order* adopts a purely defensive posture. The only limits the FCC would have imposed on ownership concentration were the antitrust laws and ad hoc oversight by the FCC through license application hearings. As noted above, the FCC has equated "diversification" in the license hearing context with what is enforceable through the antitrust laws.[260] The antitrust laws, however, are inconsistent with a first amendment policy of diversification.[261] Although the FCC reconsidered the *Twelve Station Order*, it did so only under strong public pressure. It may well attempt again to repeal the ownership limits. Even under the Twelve Station Rule as it now stands, the FCC has vindicated in part an approach to diversification that uses market economics as the standard.

V
Antitrust Enforcement

The legislative history of the Sherman Act has been interpreted to advance various, often conflicting policies. Judge Robert Bork,[262] for instance, and Judge Richard Posner[263] less polemically, have asserted that the Sherman Act's main concern is with the economic inefficiencies of monopolies and car-

259. Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 311, para. 21 (1970).

260. *See supra* notes 164-68 and accompanying text.

261. *See infra* notes 262-328 and accompanying text.

262. Bork, *supra* note 119.

263. R. POSNER, ANTITRUST LAW 23 (1976).

tels. Others have argued that the Sherman Act is intended to redistribute wealth (and power) from large firms to consumers;[264] that it should protect small businesses;[265] or that the Act should advance the goals of justice.[266] Currently, the view that the antitrust laws should serve only to advance the efficient allocation of resources dominates antitrust scholarship and government enforcement policy.[267]

Allocative efficiency is intended to maximize consumer welfare.[268] Under this approach everyone is a consumer, and the goal is to allocate the total resources of society in as efficient a manner as possible.[269] One way of conceptualizing allocative efficiency has been by reference to "potential Pareto-efficiency." Potential Pareto-efficiency states the proposition that if the gainer's gains exceed the loser's losses, the transaction is efficient whether or not the gainers actually compensate the losers.[270] For example, vertical integration of the chain of distribution is generally favored under principles of allocative efficiency; organizational efficiencies benefit the firm and consumers even though smaller competitors are harmed.[271] By measuring resources on a social scale, and by defining everyone as a consumer, allocative efficiency is indifferent to who gains and who loses, so long as the overall cost/benefit analysis is positive.[272]

A simpler statement of the goals of allocative efficiency is that low prices and high output are desired.[273] A monopoly—or rather monopoly pricing—is inefficient in this respect because the monopolist may command artificially high prices as she reduces output. There is a net social cost in that at the higher prices, some consumers forego transactions that once had priority and would have produced the largest social benefits. That is, desires are not satisfied that might have been. There is additional loss to the extent that the wealth transfered to the mo-

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264. Lande, *supra* note 119.

265. *Id.* at 103; Bork, *supra* note 119, at 10.

266. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

267. Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982).

268. *Id.* at 3-4.

269. *See generally* H. HOVENKAMP, *supra* note 226, at 46-48.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 49.

nopolist ("neutral" in and of itself) is wasted in an effort to entrench the monopoly.[274]

A monopoly, in and of itself, is not the evil. Monopoly pricing is the evil.[275] A monopoly gained through sheer skill and efficiency is not condemned under goals of allocative efficiency. If the firm is efficient, consumers are better off because prices are at their lowest. The fact that there is only one or a few producers is irrelevant.[276]

Bigness is not necessarily bad because large firms in a relatively concentrated market indicate that they have tapped significant economies of scale.[277] The networks are one example of an industry in which economies of scale in distrubition have been tapped. In the auto industry, the "Big Three" have mobilized economies of production. As the FCC realized, economies of scale are important to the economic progress of an industry.[278] Under the principles of allocative efficiency, the antitrust laws should be wielded primarily to prevent firms from combining to lower output and raise prices to artificially high levels.[279] The antitrust laws under this approach seek to attack collusive agreements directly, and to prohibit levels of concentration in a market that would permit tacit, undetectable collusion.[280] The antitrust laws, then, do not seek to limit size for the sake of limiting size.

The antitrust laws can and have failed to reach large, very powerful, but extremely efficient firms. Section 1 of the Sherman Act[281] prohibits collusive agreements. Section 1 should be as effective a deterrent to collusive behavior among broadcasters as it is in any other industry. Illegal price-fixing is as illegal under Section 1 among broadcasters as it is, for example, among oil producers.[282] But proving an "agreement" is as diffi-

274. *Id.* at 19-21.

275. *Id.* at 30; R. POSNER, *supra* note 263, at 8.

276. H. HOVENKAMP, *supra* note 226, at 30; R. POSNER, *supra* note 263, at 8.

277. H. HOVENKAMP, *supra* note 226, at 30.

278. *See supra* notes 172-80, 229-32 and accompanying text.

279. R. POSNER, *supra* note 263, at 28-30.

280. *Id. See also* H. HOVENKAMP, *supra* note 226, at 31.

281. 15 U.S.C. § 1 (1982).

282. Compare United States v. Columbia Pictures Indus., 507 F. Supp. 412 (S.D.N.Y. 1980) (preliminary injunction granted against pay-TV joint venture agreement on grounds that it constituted a per se illegal price-fixing and boycott agreement) with United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (gasoline purchase agreement among competitors per se illegal price-fixing).

cult in the context of the broadcasting industry as elsewhere.[283] In any case, express collusion is not the special concern of the diversification policy.

More problematic with regard to both antitrust enforcement and the broadcast industry is oligopoly behavior An oligopoly is a small group of nearly identical firms controlling the lion's share of a particular market.[284] The cereal industry and the broadcast networks are examples. Oligopolies have been called "shared monopolies" because the tendency is for the firms to act, though without express agreement, as a single monopolist.[285] Each tends to adopt prices, output levels and business practices that reduce output, raise prices, and inflate profits.[286] Oligopoly behavior tends to fall between the cracks of Section 1 and Section 2 prohibitions. The collusion is tacit, and so a Section 1 claim is difficult to prove in court.[287] Section 2 is directed at single-firm monopolization.[288] Since in an oligopoly each firm alone usually has insufficient market power to monopolize, any Section 2 claim usually fails.[289] Professor Turner has argued that such tacit collusion is inevitable in an oligopoly and can only be remedied by breaking up the firms.[290] Judge Posner, on the other hand, has insisted that an oligopoly comes into being because of substantial economies of scale.[291] Divestiture would create greater social losses than gains. Thus, under Posner's thesis, antitrust enforcers should attempt to identify collusive business practices and control the oligopoly by eliminating the facilitating schemes.[292]

Turner's approach would require an amendment to the antitrust laws and so far none has materialized. Posner's thesis was recently tested in collateral fashion by the Federal Trade Com-

283. *See NCCB v. FCC*, 555 F.2d at 959 (noting the difficulty of proving anticompetitive practices among media owners, citing S. BARNETT, CROSS-OWNERSHIP OF MASS MEDIA IN THE SAME CITY: A REPORT TO THE JOHN AND MARY MARKLE FOUNDATION (September 23, 1974)).

284. H. HOVENKAMP, *supra* note 226, at 92.

285. *Id. See also* Turner, *Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1225-31 (1969).

286. Turner, *supra* note 285, at 1225-26.

287. *Id.* at 1226-27. *See also* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

288. *See supra* note 126.

289. H. HOVENKAMP, *supra* note 226, at 92.

290. Turner, *supra* note 285, at 671.

291. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1571 (1969).

292. *Id.*

mission in a claim for unfair business practices under Section 5 of the Federal Trade Commission Act[293] against the anti-knock compound oligopoly.[294] The Second Circuit rejected the approach and held that, at least with respect to a claim for unfair business practices under Section 5 of the Federal Trade Commission Act, the FTC must show an intent to restrain trade, or the absence of a legitimate business purpose. Proof of industry market structure and facilitating practices was not enough.[295]

The Department of Justice attempted to attack the network oligopoly through claims under both Section 1 and Section 2 of the Sherman Act. In December 1974, it sued ABC, CBS and NBC in separate actions, alleging that the control each of the networks asserts over the production, acquisition and exhibition of prime-time programming is an attempt to monopolize, and further, that the uniform contracts used by the networks for the purchase of programs are agreements in restraint of trade.[296] In 1976, DOJ and NBC proposed a consent judgment. The settlement was approved in 1978.[297]

The consent decree places certain limits on the ability of NBC to contract for exclusive rights to programming, for options, for syndication rights, and for requirements that independent programmers use NBC production facilities.[298] In addition, it limits the amount of prime-time programming that NBC may produce in-house.[299] Many of the decree's provisions are to lapse after a period of time.[300] Most were also contingent on the DOJ obtaining similar relief from CBS and ABC.[301]

The DOJ did obtain similar relief from both CBS and ABC.[302] The consent decrees are, in fact, identical except that ABC has been allowed more hours of in-house production of

293. 15 U.S.C. § 45 (1982).

294. E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

295. *Id.* at 139.

296. *See* United States v. National Broadcasting Co., 449 F. Supp. 1127, 1129-30 (C.D. Cal. 1978).

297. *Id.* at 1129.

298. *Id.* at 1131-34. The court noted that the consent decree provisions parallel the FCC's financial interest and syndication rules imposed on the networks.

299. *Id.* at 1131. The terms allow NBC to produce two and one-half hours per week of prime-time programming, 50% *more* than it had been producing. *Id.* at 1135.

300. *Id.* at 1131.

301. *Id.*

302. United States v. American Broadcasting Co., No 74-3600-RJK (C.D. Cal.), *consent decree rept'd in* 45 Fed. Reg. 58,441 (Sept. 3, 1980); United States v. CBS, 74-3599-RJK (C.D. Cal.), *consent decree rept'd in* 45 Fed. Reg. 34,464 (May 22, 1980).

prime-time programming over the ten-year restricted period than was allowed to CBS and NBC.[303] Not only did the DOJ failed to diffuse significantly the networks' oligopoly power, the identical consent decrees in fact create a *judicially enforceable* oligopoly.

Prior to entering its consent decree with ABC and CBS, the Central District of California rejected the DOJ's Sherman Act Section 2 claim.[304] An action for monopolization under Section 2[305] requires a showing of market power, and the exercise of market power.[306] The government attempted to show that CBS's share of the prime-time market, approximately 33%, was sufficient to constitute market power. The District Court held that 33% is not a large enough market share alone to give CBS market power.[307] Citing Judge Hand, the court noted that a 60% share might be enough under antitrust case-law.[308] And while the Ninth Circuit had found market power in shares around 50%, "special factors" were required, factors the DOJ had failed to allege.[309]

The network cases show that the Sherman Act, in principle and in practice, cannot accomodate a diversification policy. First, though proof of intent to monopolize or of an agreement to restrain trade is not irrelevant to a diverse broadcast industry, such proof does not address the foremost concern of diversification; that is, size alone in relation to the rest of the market. Nor can a monopolization claim under Section 2 succeed in promoting diversity when a Section 2 claim fails against even the power of CBS. There is little doubt that the television industry is not now a diverse one, yet under antitrust law, a single network as large as ABC and CBS together might still be legal.[310] Direct attacks on the oligopoly itself have failed.

303. 45 Fed. Reg. 58,441, 58,443.

304. United States v. CBS, 459 F. Supp. 832 (C.D. Cal. 1978).

305. 15 U.S.C. § 2 (1982).

306. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (stating the test for monopolization as: "(1) [t]he possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

307. 459 F. Supp. at 835.

308. *Id.* at 836.

309. *Id.*

310. The 25% audience reach cap adopted by the FCC under Congressional goading can be taken as affirmation that the market share sufficient to constitute market power under § 2 is far too high in the context of broadcast ownership.

The Second Circuit has chilled the viability of Posner's approach. The DOJ only succeeded in gaining judicial sanction for the network oligopoly. Finally, the length and expense of antitrust litigation—the eight years it took for the DOJ to get consent decrees against the networks is not an uncommon delay — raised doubts about its appropriateness for vindicating first amendment rights. Treble damages and interest can compensate for the delay in recovering economic loss; lost free speech is not compensable.

Section 7 of the Clayton Act,[311] the anti-merger provision, is more consistent with a diversification policy. The legislative history of the 1950 Celler-Kefauver amendment to Section 7, moreover, expresses a clear concern for concentrations of economic power as such.[312] The Act seems intended, at least in part, to protect small businessmen from being gobbled up or forced out of the marketplace.[313] By protecting competitors from acquisition-hungry giants, Congress seemingly tried to prevent the accretions of political power that might threaten democratic institutions.[314] The Sherman Act had proved to be inadequate for the task.[315]

The Supreme Court later remained true to the legislative intent. In two Section 7 cases, *Brown Shoe Co. v. United States*[316] and *United States v. Von's Grocery Co.*,[317] the Court struck down mergers that would have created single firms with market shares of 7.2% and 7.5% respectively. In both cases the Court acknowledged that the merged firm would probably be more efficient. It adhered nonetheless to the congressional policies of protecting small competitors and of halting monopolies in their "incipiency."[318] The Court noted in particular the recent trends towards concentration in both the national retail shoe trade and the Los Angeles-area grocery trade.[319]

Section 7 would appear to be an antitrust weapon in aid of diversification. It might be wielded in broadcasting to prevent

311. 15 U.S.C. § 18 (1982).

312. Pitofsky, *supra* note 119, at 1061-65.

313. Lande, *supra* note 119, at 103.

314. *Id.*

315. *See* United States v. Columbia Steel Co., 334 U.S. 495 (1948) (upholding merger under § 1).

316. 370 U.S. 294 (1962).

317. 384 U.S. 270 (1966).

318. *See Brown Shoe*, 370 U.S. at 311-20; *Von's Grocery*, 384 U.S. at 275-78.

319. 370 U.S. at 318; 384 U.S. at 278.

group owners from acquiring too many stations through acquisition of other station groups. Both Section 7 and the diversification policy favor a large number of fairly equal competitors for the sake of diffusing excess *political*, not just economic power.[320]

Section 7, however, expressly exempts transactions approved by the FCC.[321] Though the FCC may, and should, take its policies into account in making its public interest determinations,[322] Section 7 by itself is essentially impotent with regard to broadcasting.

Finally, any attempt to inject first amendment considerations into antitrust enforcement is doomed to failure. In *United States v. National Association of Broadcasters*,[323] for example, DOJ alleged that NAB's self-imposed limits on commercial advertising were an agreement in restraint of trade.[324] NAB argued that the court should consider the public interest in viewing programming uncluttered by commercials.[325] The court rejected the argument, citing *National Society of Professional Engineers v. United States*,[326] and held that the "public interest" as defined by the antitrust laws is served solely by increased economic competition.[327] The court refused to re-interpret the antitrust laws to advance any other public interest goals.[328]

VI
The Future of Diversification

A. The Marketplace

The antitrust laws cannot advance the free speech principles underlying the FCC's diversification policy. In an unregulated free market economy, the vast economies of distribution attendant in broadcasting are likely to produce a handful of large,

320. *See supra* notes 113-29 and accompanying text.

321. 15 U.S.C. § 18 (1982).

322. The Commission may take antitrust policies into account in making licensing decisions, but it does not have the authority to enforce the antitrust laws as such. *FCC v. NCCB*, 436 U.S. at 795.

323. 536 F. Supp. 149 (D.D.C. 1982). *See also* United States v. National Ass'n of Broadcasters, 553 F. Supp. 621 (D.D.C. 1982) (affirming consent decree).

324. 536 F. Supp. at 154.

325. *Id.* at 166.

326. 435 U.S. 679 (1978).

327. 536 F. Supp. at 167.

328. *Id.*

powerful programming voices speaking through myriad local outlets. The antitrust laws cannot prevent this; in fact, current economic policy encourages it. Diversification, on the other hand, should be an affirmative policy aimed at creating as many viable and equally powerful voices speaking via the airwaves as possible. The FCC should not equate diversification with free market competition.

The Twelve Station Rule is not an unreasonable attempt to promote diversity. The Rule acknowledges at least that merely increasing the diversity of broadcast licensees at the local level will not increase the diversity of programming available if the local broadcasters are merely serving as conduits for a few major programming distributors. If the economics of distributing programs and advertisements requires network arrangements, then the FCC should be promoting competition at the network level. Commissioner Dawson's comments are well-taken, though: the Twelve Station Rule evidences too great an interest in protecting the established networks and too little in aiding the smaller entrepreneurs.[329] The rule does not seem likely to produce more than one or two direct competitors for the established networks.

Competition is increasing, though, and is putting pressure on the networks. The Twelve Station Rule has spawned some of that pressure, to which the purchase of ABC,[330] Ted Turner's attempted purchase of CBS,[331] the recent purchase by Taft Broadcasting Co.,[332] and Rupert Murdoch's announced intention to build a fourth network,[333] all attest. Much of the competition, on the other hand, seems to be coming from new video delivery technologies. Millions of VCRs,[334] for example, and thousands of cable systems offering dozens of channels[335] are offering alternatives to prime-time network programming.

B. DBS: The Marketplace as Laboratory

It remains to be seen what effect nascent technologies like DBS or LPTV will have on the ability of speakers to find new

329. The Commission has often been criticized as being "overidentified" with vested broadcasting interests. *See* Bazelon, *supra* note 66, at 239.

330. *See* BROADCASTING, Mar. 25, 1985, at 31.

331. *See* BROADCASTING, June 10, 1985, at 87.

332. *See supra* note 251.

333. *See* BROADCASTING, June 17, 1985, at 38, 40.

334. Twelve Station Order, *supra* note 21, at para. 35.

335. *Id.*

audiences, and of audiences to find new speakers. Aside from the ministerial matter of allotting spectrum space and granting licenses, the Commission has taken a largely hands-off approach to these new technologies. DBS serves as a striking example.

A DBS, or direct broadcast satellite, system permits the system operator to transmit a video signal via satellite directly to individual homes sporting small, one-meter wide receiving dishes.[336] Satellite transmission enables the operator to reach an audience throughout an entire time zone, or throughout the entire country.[337] And like a cable operator, the DBS operator can offer several channels of programming at once.[338] It is the most pervasive broadcast technology to date. While approving most of the interim DBS regulations, the District of Columbia Court of Appeals observed:

> DBS, with its power to reach into every home in the United States, has a potential impact on Americans far in excess of the limited radio services that prompted passage of the Radio and Communications Acts. This impact is only heightened by the Commission's interim decision to allow a DBS owner to retain control over the programming on several channels.[339]

The interim regulations, except for technical matters, leave DBS almost entirely unregulated.[340] The Commission did not impose any multiple-channel or cross-media ownership restrictions on DBS operators.[341] The Commission again stated that increased competition in the video marketplace obviated the need for stringent oversight.[342] In addition, the FCC was afraid that added regulatory burdens might quash investment in a service with extremely high start-up costs.[343] The FCC noted too that an unregulated DBS market would better serve as an experiment in the untested service's technological and economic

336. *DBS: The Space Race Is On*, CHANNELS 12 (Nov./Dec. 1983). *See also* F. SETZER, B. FRANCA, W. CORNELL, POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES, FCC OFFICE OF PLANS AND POLICY STAFF REPORT 7-8 (Oct. 2, 1980) [hereinafter cited as OPP STAFF REPORT]; *and see* B. PATTAN, TECHNICAL ASPECTS RELATED TO DIRECT BROADCAST SATELLITE SYSTEMS, FCC OFFICE OF SCIENCE AND TECHNOLOGY REPORT (1980).

337. National Ass'n of Broadcasters v. FCC, 740 F.2d at 1197.

338. *Id.* at 1207.

339. *Id.* at 1202.

340. DBS Order, *supra* note 18.

341. *Id.* at paras. 96-98.

342. *Id.* at para. 91.

343. *Id.* at para. 96. Typical start-up costs range from one-half to three-quarters of a billion dollars. *NAB v. FCC*, 740 F.2d at 1206.

viability.[344] Finally, the FCC claimed that "[i]n any case, existing antitrust laws would provide adequate protection against possible abuses of market power due to horizontal concentration of control."[345]

The Commission cannot accurately predict the future of a nascent communications technology such as DBS. The FCC must be an experimenter; its enabling Act mandates it.[346] The District of Columbia Court of Appeals[347] and the Supreme Court[348] have sanctioned the FCC's discretion to adapt regulations in novel ways to new technologies. Moreover, courts have held consistently that the FCC may employ market forces themselves as "regulatory tools."[349] The broadcast marketplace may serve as the FCC's laboratory for regulatory experiments.

If the FCC is to experiment, however, it must have means of monitoring the results of its policy tests. All too often the FCC has been faulted on just this account. Circuit Judge Mikva, for instance, in affirming in part the DBS ownership regulations, expressed his concern over the lack of data presented by the FCC on the market forces affecting its DBS decision.[350] He nonetheless upheld the rules as within the FCC's discretionary power to encourage new technologies.[351] The General Accounting Office, in a report on the FCC's handling of deregulation in the international telecommunications markets, also noted its concern that the Commission was relying too heavily on a competitive market to regulate for it without putting into place adequate systems for monitoring.[352] The FCC, therefore, must establish a system for monitoring the effects of its decisions on the diversity of the marketplace.

The FCC in pursuit of new technologies may not ignore longstanding policies either. Judge Mikva reminded DBS operators and the FCC alike that diversification remains a vital FCC policy. Both were warned to be prepared for regulatory action if

344. *Id.* at paras. 78-81.

345. *Id.* at para. 95.

346. 47 U.S.C. § 303(g) (1984).

347. *NAB v. FCC*, 740 F.2d at 1200.

348. National Broadcasting Co. v. United States, 319 U.S. at 219-220.

349. *NAB v. FCC*, 740 F.2d at 1200.

350. *Id.* at 1208.

351. *Id.* at 1207-08.

352. FCC Needs to Monitor a Changing International Telecommunications Market, General Accounting Office, RCED-83-92 (Mar. 14, 1983).

the Commission's premises failed.[353]

The problem here is that the pace of technological change is increasing rapidly. Left unregulated, with only the antitrust laws and ad hoc FCC oversight as available defenses against excessive broadcasting power, it is possible, even probable, that vested economic interests will become entrenched before the FCC can perceive the need to act, much less act. Furthermore, the FCC has always been loathe to divest broadcast owners of properties, the ownership of which may be antithetical to the public interest. In establishing local multiple ownership rules, for example, the FCC has routinely "grandfathered" existing combinations for the sake of "stability."[354] The FCC may believe itself forced to accept a future status quo, and will feel itself unable to alter it despite its diversification policy.

C. Promoting Technologies of Diversification

The FCC cannot rely on short-term remedies. On the other hand, changing technologies require that the FCC permit experimentation, both with new technologies, and with established television and radio systems competing with and taking advantage of technological changes. But the experiment must be controlled.

The FCC should first define its long-range goal for a communications industry structure. If that structure is to serve best the public's interest in the free dissemination of, and access to, ideas and experiences, it must be as diverse as technology and economics permit.

Experience has shown that the economics of broadcasting technology are conducive to economies of large scale distribution. Broadcasting is a public good; that is, it costs the broadcaster as much to transmit to a thousand consumers as it does to transmit to one.[355] The costs of production do not increase with the costs of consumption.[356] Public goods are in general compatible with natural monopolies.[357] Cable television franchises are one example. The telephone system, at least on the local level, if not on the national level, is another example.

353. *NAB v. FCC*, 740 F.2d at 1208-09.
354. Newspaper/TV Order, *supra* note 7.
355. *See generally* B. OWEN, J. BEEBE & W. MANNING, *supra* note 173, at 18.
356. *Id.*
357. *Id.*

Such monopoly arrangements are simply the most economically efficient means of delivering a public good.

Satellite technology suggests the ability to create very cheaply systems tapping economies of scale on a level never achieved before. The continental range of a single DBS system points to such a possibility. Yet, satellite technology, and cable television technology, also offer for the first time significant possibilities for economies of *small* scale. A local station or a group of stations, for instance, might fairly cheaply arrange to carry the program of an independent producer transmitted via satellite. The distribution channels of the large network operators are avoided. Through program choices, local stations could thereby become strong editorial voices in their respective communities. In addition, fiber optic cable technology, and "pay-per-view" arrangements currently being tested by cable operators, offer the possibility that individual audience members could purchase programming from individual program suppliers in almost the same way that an individual telephone caller "purchases" a direct communication link to another telephone user.[358]

The ultimately diverse video delivery structure, for example, might be akin to the present telephone system. Each viewer would have direct access at any time to any available program. The viewer would pay for each "view" or minute of viewing, therefore obviating the need for programmers to sell their product first to mass market advertisers. Each programmer would have access to every viewer, and each viewer would have access to every programmer.

There are other medium- and long-range alternatives. The point is that the FCC should establish and carry out policies that will favor the long-term development of such distribution systems. Ultimately, the Twelve Station Rule should be seen as an interim measure designed to promote some competition at the network level until new technologies have defined new market structures. Networking may become obsolete and advertising may cease to be the main source of broadcasting revenues. The goal should be to develop a viable (perhaps common carrier) market structure in which ownership rules will be unnecessary; that is, where network and station owners—the bottlenecks of communication—are obsolete, where a

358. *See, e.g.*, BROADCASTING, Oct. 7, 1985, at 53.

technological infrastructure with virtually unlimited access is the only medium between speaker and listener. At the very least, the Commission should create incentives for research and development in the avenues of satellite and cable technology that will lead in the direction of systems of *small-scale* distribution. It might also subsidize short-term experimental systems using new technologies, and employing unique combinations of satellite, broadcasting and cable technologies that will favor universal, mutual access between viewers and programmers.

VII
Conclusion

It is the FCC's statutory responsibility to protect the public interest in broadcasting matters. At the heart of the FCC's enabling policy is the understanding that in regulating the media of communication, the government is controlling communication itself. The very existence of the broadcasting industry implicates the first amendment right of free speech. The FCC, Congress and the Supreme Court have consequently acknowledged that the public interest requires the FCC to promote affirmatively a broadcast environment in which as many ideas gain access as readily as possible to as wide an audience as is willing to listen.

In practice the economic health of vested broadcast interests has been the FCC's foremost concern. The result of its diversification policy is triumvirate control over the marketplace of ideas. Now that new technologies are entering the market, the FCC has decided to let the private broadcast interests themselves define the future first amendment environment. Speech will no longer be free, but will cost what the market will bear.

The fallacy behind the FCC's free market approach to regulation is the notion that the relevant products at issue are news items, discrete advertisements, and mass-appeal packaged programs. From the point of view of broadcast owners, that may be true. But the FCC is obligated to protect the *public* interest. From the public's point of view, there are no "products" at issue. At issue is the environment for individual learning and understanding. Truth is not a fungible commodity, no matter how far the networks have gone to manufacture it into peanut butter and potato chips.

The FCC must act affirmatively to keep the channels of communication open. The antitrust laws are not designed for this purpose. If the FCC must experiment with new technologies, and it must, the experiment, like any other, should be a controlled one. On one side, research and development policies designed to promote economies of small scale should propel change. On the other, a diversification policy adhering to the non-economic concerns of the first amendment should prevent crystallization of media power.